Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 14-57
	)	
Comcast Corp. and Time Warner Cable Inc.	))	
	)	
For Consent to Assign or Transfer Control of Licenses and Authorizations	))	

COMMENTS OF THE TENNIS CHANNEL, INC.

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SUMMARY

Comcast Corporation ("Comcast") is the largest multichannel video programming distributor ("MVPD") and broadband provider in the nation, dwarfing other cable and satellite operators. It also is one of the single largest holders of programming interests—a position it secured three and a half years ago when it added the sizeable programming interests of NBC Universal ("NBCU") to its own sports and other programming interests. Today, these programming interests include 50 national cable networks, numerous regional sports networks, the NBC Broadcast Network, and some of the largest broadcast television stations in the country, all located in competitively critical television markets. Moreover, Comcast's role in the video programming marketplace extends beyond these traditional video programming and distribution businesses. In addition to its broadband assets, Comcast has secured a dominant position in emerging video distribution markets, including through its leading TV Everywhere platform and the acquisition of dynamic advertising insertion and other technologies.

Comcast now proposes to combine with Time Warner Cable Inc. ("TWC")—the second largest cable operator in the nation and the owner of significant regional sports programming interests—and to "swap" certain cable systems with Charter Communications, Inc. and thereby geographically consolidate its distribution network in key television markets. Comcast and TWC do not presently operate in the same coverage areas, but the combination dramatically enhances Comcast's ability to foreclose rival programming networks from competition against its programming interests. The combined entity would control access to more than a third of all pay-TV households and nearly 40 percent of all broadband homes. Its holdings include all of the top 10 television markets, including New York City and Los Angeles, the two most important television markets for any cable channel seeking to attract advertisers and secure licenses for marquee content. The combined entity would have unprecedented "bottleneck" control over the content streamed or otherwise accessible via broadband to its 30 million broadband subscribers or through its TV Everywhere or video on demand services.

As Congress and the Commission have long recognized, Comcast's cable distribution network (supplemented by its other distribution platforms, services, and technologies) give it the incentive and ability to discriminate in favor of its affiliated programming networks and against unaffiliated programming networks that compete with its programming interests. The Commission identified this power as a concrete public interest harm when it approved Comcast's acquisition of NBCU, but it determined that conditions would be adequate to address this harm. Since that time, however, the Commission has had the opportunity to adjudicate a program carriage complaint under Section 616 of the Communications Act filed by The Tennis Channel ("Tennis Channel"), in which the Commission found that Comcast discriminated against Tennis Channel in a number of respects and engaged in a pattern of discriminatory conduct against unaffiliated sports programming interests. The evidence adduced in that case, and the Commission's own findings about Comcast's discriminatory conduct, raise questions about the efficacy of Section 616 to protect against Comcast's existing incentive and ability to discriminate—threats that that would be exacerbated if Comcast is permitted to enhance significantly its distribution network. In addition, Comcast's ongoing conduct toward independent networks, notwithstanding the merger conditions adopted by the Commission three and a half years ago, raise serious questions about the efficacy of those conditions.

To the extent the existing program carriage framework and the conditions that the Commission imposed in connection with the NBCU merger are not adequate, even today, to protect against Comcast's incentive and ability to foreclose independent networks from competing effectively, it should be clear that more stringent conditions are necessary to protect against a significantly enhancement to Comcast's ability to limit or eliminate competition from rival programming networks. It is clear that the transaction should not be approved absent significant and unambiguous conditions that will provide a check against Comcast's discriminatory incentives and deliver meaningful relief if it nonetheless engages in discriminatory conduct.

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To: The Commission

COMMENTS OF THE TENNIS CHANNEL, INC.

The Tennis Channel, Inc. ("Tennis Channel") believes that the applications seeking the Federal Communications Commission's (the "Commission's") approval of Comcast Corporation's ("Comcast's") proposed acquisition of Time Warner Cable Inc. ("TWC"),[1] (and the related transfer applications involving Comcast, Charter Communications, Inc. ("Charter"), and SpinCo)[2] raise serious questions requiring, at the least, the imposition of significant conditions that will protect competition in the programming marketplace.

The Tennis Channel is one of the leading independent sports programming services on cable and satellite systems. Through substantial effort and high quality programming, it can now be seen in a Nielsen-estimated 36 million homes nationwide. It brings popular year-round, high quality tennis programming (including the exclusive rights to telecast portions of all four tennis Grand Slam events) and a fresh sports voice to the video content marketplace.

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[1] Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement (filed Apr. 8, 2014) [hereinafter "*Comcast-TWC Application*"].

[2] Public Interest Statement of SpinCo, Charter Communications, Inc. and Comcast Corporation, Spin Transaction, MB Docket No. 14-57 (June 4, 2014).

As the Commission specifically has found on prior occasions, Comcast, even as currently constituted, has significant incentive and ability to discriminate against rival programmers due to its sizeable programming interests and its significant distribution network, and it has exercised that power to protect its own dominant, vertically integrated position. Today, Comcast is both among the largest programming and content businesses in the country, with ownership interests in a number of national and regional cable networks, as well as the NBC Television Network and television broadcast stations in New York, Los Angeles, and other top markets, the single largest multichannel video programming distributor ("MVPD"), and the largest broadband provider in the country. The proposed combination of Comcast and TWC would thus make the largest and most significant vertically integrated video distributor even larger and, more importantly, would enhance its ability to restrain healthy competition in the video programming marketplace.

As a result of the proposed transactions, Comcast would be the dominant video services provider in all of the top 10 television markets, including New York City and Los Angeles, the two most important—indeed, critical—television markets for national programming services seeking to attract advertisers and obtain competitively desirable content rights. Comcast likewise would be the dominant operator in 21 of the top 25 television markets, and the geographic consolidation contemplated by the divestiture transactions—whereby Comcast/TWC and Charter would "swap" certain cable systems—would provide Comcast penetration in these top markets beyond the existing penetration of Comcast and TWC today. Already the nation's largest broadband provider, Comcast also would increase its share of the nation's broadband homes to 40 percent.

As a result, Comcast/TWC would have the ability to stifle independent networks like Tennis Channel from competing for the audience, advertising, and content rights essential to the success of any programming service. Moreover, the transaction would enable Comcast to exercise significant control over the degree and method in which programming entities can compete for viewers through the use of emerging video distribution platforms. The transaction therefore should not be approved unless the Commission is satisfied that it can impose significant and unambiguous conditions upon the combined entity that will provide a check against Comcast's incentives and ability to discriminate and meaningful relief if it nonetheless engages in discriminatory conduct. As discussed below, the conditions that the Commission imposed when it approved the Comcast/NBCU merger are inadequate to this task.

I. Comcast Has A History Of Leveraging Its Distribution Assets To Favor Its Affiliated Programming Entities In Violation Of Commission Requirements.

In 1991, Congress specifically considered banning vertical integration in the cable industry altogether.[3] Congress was concerned about the incentives and ability of large vertically integrated operators to "abuse [their] locally-derived market power to the detriment of programmers and competitors."[4] By favoring affiliated programmers over unaffiliated programmers with respect to the terms of carriage, vertically integrated operators could effectively choose content winners and losers from among video programmers—not on the ground of quality or audience appeal, but solely on the basis of a distributor's financial stake in the programming entity.[5] Instead of banning vertical integration outright, however, Congress

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[3] Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 27 (1991) [hereinafter "*Senate Report*"] (considering the "appeal" of an outright ban of vertical integration but deciding instead to adopt the restrictions on vertically-integrated distributors embodied in Section 616).

[4] *Id.* at 24.

[5] *Id.* at 25–26; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642 ¶ 2 ("Congress concluded that vertically integrated cable operators have the incentive and ability to favor affiliated (continued…)

decided to permit cable operators to integrate vertically but only if they accepted important limitations on their ability to engage in profit-maximizing behavior. Most notably, under Section 616 of the Communications Act, Congress expressly prohibited vertically integrated operators from discriminating against independent networks and in favor of their own and established a process pursuant to which victimized programming entities could seek redress.[6]

In 2011, in the Comcast/NBCU merger proceeding, the Commission permitted Comcast to enhance significantly its programming interests and, therefore, its incentive and ability to discriminate against non-affiliated programmers. The Commission concluded that Section 616 itself and certain merger-specific conditions adopted by the Commission were adequate to safeguard diversity and competition in video programming, consistent with the "broad aims" of the Communications Act.[7]

The Commission made this determination notwithstanding its own economists' conclusions that Comcast was at that very time systematically "discriminat[ing] against unaffiliated programming in favor of its own"[8] and the Commission's own findings that "the combination of Comcast, the nation's largest cable service provider and a producer of its own

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programmers over unaffiliated programmers with respect to granting carriage on their systems. Cable operators or programmers that compete with the vertically integrated entities may suffer harm to the extent that they do not receive such favorable terms.").

[6] 47 U.S.C. § 536(a)(3); *Senate Report* at 25–26.

[7] *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238 ¶ 23 (2011) [hereinafter "*Comcast/NBCU Merger Order*"].

[8] *Id.* at Technical App. ¶ 70. The Commission's economists studied Comcast's carriage decisions across the markets in which it operates, and found that it systematically favors its affiliated programming with respect to carriage and channel placement. *Id.* at Technical App. ¶ 65. Further, in markets with relatively high levels of MVPD competition, the Commission found that Comcast reduces the carriage of its own networks—results that lead to a conclusion that Comcast favors its affiliated programming for anticompetitive reasons. *Id.* at Technical App. ¶ 70.

content, with NBCU, the nation's fourth largest owner of national cable networks, will result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks."[9] The Commission believed that conditioning the merger on "a non-discrimination requirement [which included a prohibition on retaliation for bringing a program carriage complaint], a condition to make ten channels available to independent programmers over a period of time, and a narrowly tailored neighborhooding requirement for news networks," would mitigate these potential public interest harms.[10]

Since consummation of the Comcast/NBCU transaction in January 2011, however, the Commission has had the opportunity to take a further close look at Comcast's conduct with respect to independent programming networks, including Tennis Channel, that compete with Comcast's affiliated programming entities, under both Section 616 of the Communications Act and the merger conditions. As described in greater detail below, the Commission's own findings since January 2011 raise serious questions about whether the program carriage rules and the *Comcast/NBCU Merger Order* conditions are adequate, even with respect to Comcast as currently constituted, to protect against its incentive and ability to foreclose independent networks like Tennis Channel from competing effectively. If that is the case, it is not clear how these provisions could be adequate to protect against a significantly enhanced Comcast's ability to foreclose rival networks if it is permitted to acquire TWC's distribution network.

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[9] *Id.* ¶ 116.

[10] *Id.* ¶ 110.

A. The Commission Has Found That Comcast Engaged In Discriminatory Conduct Against Tennis Channel And In Favor Of Its Affiliated Networks, Golf Channel and Versus (now NBC Sports Network).

Comcast's discriminatory conduct towards Tennis Channel has been the subject of a recent and thorough administrative review, all of which followed the *Comcast/NBCU Merger Order*. On July 24, 2012, after lengthy hearings and an Administrative Law Judge's ("ALJ") Initial Decision, the Commission found that "Comcast discriminated against Tennis Channel and in favor of Golf Channel and Versus [its two wholly-owned national sports networks] on the basis of affiliation," in violation of Section 616 of the Communications Act.[11] Although that decision has been vacated by the D.C. Circuit on the ground that the Commission failed to consider an additional test not previously employed by the Commission or addressed by the parties, the panel left the ALJ's and Commission's fact-findings regarding Comcast's discriminatory conduct undisturbed.[12] Tennis Channel has since filed a Petition for Further Proceedings, which is now pending before the Commission, requesting that the Commission reaffirm its prior decision on the basis of the evidence in the existing record that supports a

[11] *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 8508 (July 24, 2012) [hereinafter "*Tennis Channel Order*"]. (Versus was previously known as Outdoor Life Network until it was renamed Versus in the mid-2000s. *Id.* ¶ 48 & n.150. After Tennis Channel filed its complaint, Versus was renamed NBC Sports Network. *Id.* ¶ 112.)

[12] *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) (setting forth new tests for evaluating the question of whether there was a reasonable non-discriminatory justification for Comcast's conduct, without disturbing the Commission's factual findings). The court's decision was solely based on the Commission's failure to muster "substantial evidence" to support the court's new interpretation of the Commission's rule, *id.* at 987, and the Commission remains free to adopt a contrary interpretation of Section 616 in accordance with applicable administrative law principles.

finding under the new test.[13] Regardless of the panel decision, the Commission now has an obligation to take account of its undisturbed factual findings in the *Tennis Channel* case as it evaluates the transaction proposed by Comcast. The key factual findings include the following:

- Tennis Channel competes directly with Comcast-owned Golf Channel and NBC Sports Network [then known as Versus] for audience, advertisers and content, which means that Comcast has had strong incentives to make Tennis Channel less of a competitive threat with respect to advertiser dollars and programming licenses, including the rights to important tournaments.[14]

- Even though Tennis Channel performs comparably to (or better than) Golf Channel and NBC Sports Network, and even though Tennis Channel charges Comcast less for the right to carry it than Comcast charges itself to carry Golf Channel and NBC Sports Network, Comcast relegates Tennis Channel to a narrowly distributed extra cost sports tier that reaches just 15 percent of subscribers,[15] while it carries its two affiliated networks on a digital tier that reaches 100 percent of subscribers.[16]

- For carriage purposes, Comcast treats Golf Channel and NBC Sports Network measurably more favorably and Tennis Channel measurably less favorably than the three networks are treated by other MVPDs.[17]

- Comcast followed business practices in which Comcast's distribution executives accommodated its programming executives with respect to channel placement, carriage levels, and other terms and conditions for Comcast-owned channels.[18] With respect to sports services, there is a "pattern" whereby Comcast's level of carriage often "tracks the significance of its equity stake."[19] Indeed, Comcast broadly distributed NBC Sports

[13] Tennis Channel Inc., Petition for Further Proceedings and Reaffirmation of Original Decision, MB Docket No. 10-204 (March 11, 2014)**.**

[14] *Tennis Channel Order* ¶¶ 52–55

[15] This penetration level fluctuates, although it remains below 20 percent.

[16] *Tennis Channel Order* ¶ 55 (noting that the ratings for the three channels "are almost identical"); *id.* ¶ 68 ("Comcast gives Golf Channel and Versus dramatically broader carriage than Tennis Channel."); *id.* ¶ 78 (noting that "Comcast would have paid substantially less to carry Tennis Channel broadly then it did to carry Golf Channel and Versus broadly").

[17] *Id.* ¶ 71.

[18] *Id.* ¶ 45 ("Comcast engaged in a general practice of favoring affiliates over nonaffiliates."); *see also The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, 26 FCC Rcd 17160 ¶¶ 60–61 (Dec. 20, 2011) [hereinafter "*Initial Decision*"].

[19] *Tennis Channel Order* ¶ 47. Comcast carries its majority-owned networks to 100 percent of subscribers, while it carries those networks in which it has a minority or indirect ownership on (continued…)

Network when it first acquired the network, despite recognition by Comcast executives that the network was "a crappy channel that was dead in the water."[20] Comcast senior executives admitted that "affiliated networks are 'treated like siblings as opposed to like strangers,' by Comcast's distribution executives and that affiliates 'get a different level of scrutiny' than unaffiliated networks."[21]

- Comcast's discriminatory treatment of Tennis Channel unreasonably restrained Tennis Channel's ability to compete in the marketplace, and Comcast knew that keeping Tennis Channel on a sports tier would necessarily have that effect.[22] Comcast's limited distribution of Tennis Channel "situates the network below [a] 40 million subscriber threshold that the advertising industry uses to determine the placement of national ads," and Comcast thereby discourages advertisers from placing advertisements on Tennis Channel and provides Golf Channel and NBC Sports Network with a "competitive advantage."[23] Likewise, as a consequence of Comcast's limited distribution, Tennis Channel was unable to acquire the rights to telecast certain tennis event programming, a fact of which Comcast was aware, even as Comcast programming executives were deciding whether to acquire tennis rights held by Tennis Channel.[24]

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intermediate tiers, and carries only those networks in which it does not have any financial interest on its narrowly penetrated sports tier. *Id.*

[20] *Id.* ¶ 48.

[21] *Id.* ¶ 46; *see also Initial Decision* ¶ 61 (noting that Comcast Cable plays an active role to provide affiliated programming networks with favorable channel positioning); *id.* ¶ 60 (finding that Comcast Cable's Vice President had previously directed her staff to ensure that all Comcast cable systems provided Versus a specified level of carriage—a minimum level Versus had committed contractually to reach in order to obtain the rights to telecast professional hockey games from the National Hockey League); *id.* (finding that Comcast Cable's Executive Vice President of Content Acquisition assisted Versus in its negotiations with DIRECTV relating to level of distribution and other terms and conditions of carriage—i.e., "representing the programming side in these negotiations").

[22] *Tennis Channel Order* ¶ 83; *see also NFL Enters. LLC v. Comcast Cable Commc'ns, LLC,* Transcript at 1911-12, MB Docket No. 08-214 (Apr. 17, 2009) (testimony of Comcast executive Jeffrey Shell acknowledging that, "if you're an ad-supported network[,] the sports tier that Comcast has, as currently configured, doesn't work for you"); *see also The Tennis Channel, Inc. v. Comcast Cable Commc'ns., LLC,* Proposed Findings of Fact and Conclusions of Law of The Tennis Channel, Inc., MB Docket No. 10-204, ¶179 (rel. June 7, 2011) (acknowledgments of Comcast executive Madison Bond that the sports tier was not a "viable" tier on which to carry a network).

[23] *Id.* ¶¶ 84–85.

[24] *Id.* ¶ 84 n. 263. In fact, at the very same time of the hearing before the Administrative Law Judge, Comcast was seeking to acquire for NBC Sports Network the rights to carry the Wimbledon Championships then held by Tennis Channel, and it previously had considered obtaining French Open rights for NBC Sports Network. *Initial Decision* ¶ 26.

- “Comcast’s extensive cable distribution network affords it the ability to use its video distribution market position to harm other competing video programming firms and harm competition in video programming,” and the Commission rejected as unpersuasive and incorrect Comcast arguments that its control over 24 percent of the MVPD market was inadequate to enable it to harm independent programmers, like Tennis Channel.[25] Rather, Comcast already has significant ability to restrain competition: the Commission found that, “[i]n addition to serving almost a quarter of all homes in the United States, Comcast dominates seven of the top ten MVPD markets, and has a substantial presence in an eighth market. . . . Comcast also holds more than 40 percent of the market in 13 of the 20 largest markets.”[26]

On the basis of this large volume of evidence of discrimination—and finding no persuasive evidence or argument that the reasons for the differential treatment were “nondiscriminatory”—the Commission concluded that Comcast discriminated against Tennis Channel on the basis of affiliation, further concluded that this discrimination unreasonably restrained Tennis Channel’s ability to compete in violation of Section 616, and ordered Comcast to provide Tennis Channel with “carriage equal to that of its similarly situated affiliates, Golf Channel and [NBC Sports Network].”[27]

In sum, since the *Comcast/NBCU Merger Order* was adopted, the Commission and its Administrative Law Judge have had specific occasion to confront the central problem that Section 616 of the Communications Act was adopted to address and to conclude on the basis of a full record that Comcast discriminates in favor of its affiliated networks and against unaffiliated sports networks, including Tennis Channel, in violation of Section 616. It also found that Comcast engages in a pattern of leveraging its distribution assets to protect its affiliated programming interests from competition for advertisers, audience, and content rights, notwithstanding the Commission’s program carriage rules. These damaging findings, made after

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[25] *Tennis Channel Order* ¶ 87 (quoting *Comcast/NBCU Merger Order* ¶ 116).

[26] *Id.*

[27] *Id.* ¶ 112.

the *Comcast/NBCU Merger Order*, call into question whether the program carriage framework, as currently constructed, provides independent programmers meaningful protection from Comcast's discriminatory conduct.

B. Comcast Flouted The Intent Of Non-Discriminatory Channel Positioning Obligations Adopted By The Commission.

Since the imposition of the *Comcast/NBCU Merger Order* conditions three and a half years ago, the Commission also now has a basis for evaluating the efficacy of the merger conditions imposed in that proceeding.[28] Among the merger conditions imposed in the *Comcast/NBCU Merger Order*, the Commission adopted a condition that required Comcast to "neighborhood" independent news and business news channels (such as CNBC and MSNBC, both of which Comcast was seeking to acquire) with other similar channels in certain circumstances to prevent Comcast from discriminating against unaffiliated news networks. Specifically, the condition required that:

> If Comcast now or in the future carries news and/or business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup, Comcast must carry all independent news and business news channels in that neighborhood.[29]

Notwithstanding the obvious intent of this condition, Comcast refused to neighborhood Bloomberg Television with other news and business news channels on numerous cable systems, asserting that it did not have a "neighborhood" of news and/or business news channels. Comcast conceded it had placed four news or business news channels within five adjacent channel positions on many of its systems, but Comcast argued that four out of five channel positions was

[28] *See Bloomberg L.P. v. Comcast Cable Commc'ns, LLC*, Memorandum Opinion and Order, 28 FCC Rcd 14346 ¶ 2 (Sept. 26, 2013) [hereinafter "*Bloomberg Order*"].

[29] *Comcast/NBCU Merger Order* at App. A, Sec. III.2.

not yet "a significant number or percentage of news and/or business news channels."[30] Further, notwithstanding the plain language of the condition, Comcast argued that the condition applied only to new channel lineups created after the *Comcast/NBCU Merger Order* and not to Comcast's lineups as they existed on the date of the *Comcast/NBCU Merger Order*.[31]

The Commission rejected these two arguments in September 2013,[32] but Bloomberg Television was forced to expend resources for more than two and a half years following the Commission's adoption of the neighborhooding condition in order to obtain nondiscriminatory channel positioning.

C. Comcast Has Not Satisfied The Policy Aims Of Other Conditions Adopted By The Commission.

Likewise, there are also serious questions about whether Comcast has honored the spirit of its commitment—also adopted by the Commission as a condition in the *Comcast/NBCU Merger Order*—to launch ten new independent programming networks over a period of eight years following the merger. In accordance with the schedule that was imposed through the *Comcast/NBCU Merger Order*, Comcast has launched five independent networks since January 2011. Comcast has relied on having met this benchmark as justification for grant of the application pending in this proceeding, but it has provided very little information about its selection of these five networks or whether it carries these networks on terms and conditions that are as favorable as those on which it carries its affiliated networks. Comcast largely launched brand new independent networks rather than existing programming networks that already had

[30] *Bloomberg Order* ¶ 23.

[31] *Id.* ¶ 30.

[32] The Commission did agree with certain other of Comcast's arguments. *Id.*

any distribution on other systems.[33] It also appears to have avoided launching networks that could become competitive with those in which it has financial interests.[34]

Further, notwithstanding Comcast's assurances to the Commission that this commitment would create, "floors, not ceilings," and that it would add additional independent channels,[35] Comcast appears to have done only the minimum required under the schedule set forth by the Commission required—no more. To the extent that Comcast carefully has selected networks unlikely to compete with its owned networks and carries them subject to terms and conditions that are unlikely to allow them to compete effectively, there is a real question about whether these conditions have meaningfully enhanced program ownership diversity and competition.

II. Comcast Has Undeniable Incentives And Ability To Discriminate Against Independent Programmers, And The Acquisition Of TWC's Significant Cable And Broadband Interests Would Significantly Magnify These Risks.

Against the background of Comcast's discriminatory conduct discussed above, the Commission must consider Comcast's argument that the addition of more than seven million homes to its distribution footprint—including a much greater consolidation of homes in the nation's key television markets—will not enhance its ability to harm competition and diversity in the video programming marketplace.

A. The Transaction Greatly Magnifies Public Interest Harms That The Commission Previously Has Identified.

As the Commission previously has recognized, Comcast already has an "extensive cable distribution network" with especially significant market share in some of the nation's highest-

[33] See Press Release, Comcast, Comcast Announces Agreements with Four New Minority-Owned Independent Networks (Feb. 21, 2012) *at* http://corporate.comcast.com/news-information/news-feed/comcast-announces-agreements-with-four-new-minority-owned-independent-networks.

[34] *Id.*

[35] *Comcast/NBCU Merger Order* ¶ 120.

ranked DMAs,[36] and foreclosure from Comcast's current distribution footprint makes it very difficult for an independent video programmer that competes with Comcast channels to be an effective competitor.[37] The Commission again reached this conclusion when it found, on the basis of the record evidence in the *Tennis Channel* case, that Comcast's discriminatory conduct had caused Tennis Channel "harms . . . of such a magnitude that they clearly restrain Tennis Channel's ability to compete fairly with similarly situated networks."[38]

Now, just three and a half years later, after it significantly increased and consolidated its market power in the programming marketplace, Comcast is seeking to greatly expand its already "extensive" distribution network by acquiring more than seven million additional households and further consolidating its market position in the nation's highest-ranked DMAs. This combination creates an even greater capacity for Comcast to disadvantage rival programmers—a threat that is further magnified by Comcast's emergence as a dominant retailer and wholesaler of TV Everywhere and VOD services.

First, a combined Comcast/TWC would reach more than 30 million video and broadband subscribers—more than a third of all pay-TV households and nearly 40 percent of all broadband homes.[39] It would therefore provide Comcast/TWC "bottleneck" control over the content

[36] *Comcast/NBCU Merger Order* ¶ 116.

[37] *See id.*

[38] *Tennis Channel Order* ¶ 84.

[39] Moreover, the 30 million subscriber figure underestimates the number of viewers and other consumers that would be impacted by Comcast's conduct. Today, Comcast negotiates for programming services on behalf of certain joint ventures, such as Mid-Continent Communications and Bresnan Broadband Holdings, *see* Applications of General Electric Co. and Comcast Corp. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement at 17 n.17 (filed Jan. 28, 2010), and there are questions about whether Comcast will negotiate for Bright House Network, LLC systems if the present application is granted, *see Comcast-TWC Application* at 173, n. 468. In addition, through its Headend in the Sky (or "HITS") service, Comcast Media Center ("CMC") provides a number of small MVPDs (continued…)

streamed or otherwise accessible via broadband to its 30 million broadband subscribers or through its TV Everywhere or VOD services.

This concentration creates an inherent public interest threat to competition in the video programming marketplace. Networks that do not reach a sufficiently large base of subscribers around the country already have difficulty attracting national advertisers and competing for content licenses.[40] The combination of Comcast and TWC would make it easier for Comcast to foreclose rival programming channels from such a critical mass of subscribers and therefore undermine competition for advertisers and programming rights. Indeed, in order to acquire the approximately 7.1 million subscribers that Comcast would acquire in one fell swoop through these transactions (*i.e.*, TWC's approximately 11 million video subscribers minus the 3.9 subscribers that Comcast has proposed to divest to Charter or SpinCo), Comcast would need to acquire *nearly every single cable operator in the country* outside of the eight largest cable operators.[41] (Even Charter, the next largest cable operator after TWC, would be only one-quarter the size of Comcast post-merger.)[42]

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with "turnkey" linear video services—*i.e.*, CMC negotiates with programming networks for the rights to deliver their programming to its MVPD customers and then provides its MVPD customers the ability to "pass through HITS-delivered linear programming networks directly to customers . . . ." *See* Responses of Comcast Corporation to the Commission's Second Information and Document Request (Response to Question 77), attached to Letter from Michael H. Hammer, Counsel to Comcast Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 18, 2010).

[40] *See Initial Decision* ¶ 88(noting that "Comcast itself recognizes that limited distribution impedes [a programmer's] ability to obtain valuable programming rights); *id.* ¶ 86 ("[T]hose holding broadcast rights to high-profile events 'want the widest exposure possible,' and therefore favor networks having wider distribution."); *id.* at 89 (finding that placement on a narrowly distributed sports tier "substantially reduces the number of [a network's] potential viewers and thus makes it more difficult for the network to sell advertising").

[41] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, at Tbl 5 (2012) (showing that "All Other (continued…)

Further, as the Commission previously has recognized, Comcast's ability to harm independent programming entities exceeds its national reach due to the "ripple effect" that its carriage decisions have on all other MVPDs.[43] The impact of this "ripple effect"—whereby smaller video distributors model their program carriage decisions on Comcast's conduct due to its status as a market leader—will be magnified as a result of the merger. As the second largest cable operator, TWC has had the capacity to influence the program carriage decisions of smaller MVPDs.[44] Thus, even though Comcast and TWC do not serve the same coverage areas, TWC has had the ability (largely untainted by programming interests of its own) to enhance the carriage of independent programmers seeking to build a broad base of carriage across MVPDs. Post-merger, it, of course, will no longer play that role, making Comcast that much more influential to the program carriage decisions of pay-TV providers across the country.[45]

Second, post-merger, Comcast would have the ability to prevent rival programmers from reaching TWC's and Charter's existing subscribers in the New York City and Los Angeles markets, which are disproportionately important to cable networks for purposes of attracting advertisers and satisfying content rights holders assessing potential licensees. As even

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Cable" (*i.e.*, all cable operators excluding the largest 7 operators) constitutes 7.3 million subscribers).

[42] *Id.*

[43] *Tennis Channel Order* ¶ 87; *see also Initial Decision* ¶ 63.

[44] *Tennis Channel Order* ¶ 87 ("Because Comcast Cable is the largest MVPD in the United States, its carriage decisions have a strong influence on other MVPDs.").

[45] Like Comcast, TWC today relegates Tennis Channel to its sports tier. However, upon expiration of Tennis Channel's affiliation agreement with TWC, Tennis Channel reasonably expected to engage in market-based contractual negotiations with a non-vertically integrated TWC to expand Tennis Channel's carriage on TWC systems, consistent with its experience with recent negotiations with a number of other MVPDs. The practical impact of the merger is that any such negotiations will now presumably be influenced by Comcast's substantial programming interests in the absence of appropriate conditions.

Comcast's own economists have acknowledged, "certain DMAs, such as New York, are more valuable to content providers and/or advertisers than other areas."[46] As a practical matter, New York and Los Angeles are home to studios, critics, and other "tastemakers," as well as important elements of the advertising community. Without carriage in these markets, it would be that much more difficult for rival programmers to compete with Comcast-owned networks for advertising and programming.

Third, the merger would combine TWC's control of New York and Los Angeles with Comcast's control over other major television markets, such as San Francisco, Washington, D.C., Chicago, Boston, and Atlanta. Today, TWC and Charter separately exercise carriage decisions with respect to their systems in New York and Los Angeles, while Comcast exercises carriage decisions over its systems in these other major urban markets. However, the merger would combine operation into a single entity that would serve as a "bottleneck" for video programming for all of the top 10 DMAs.

Finally, to the extent that a programmer is able to negotiate successfully for distribution from Comcast/TWC, the combined entity would have undue leverage to extract anticompetitive terms of carriage. This power will not be limited to the imposition of less favorable terms for unaffiliated networks than Comcast provides to its affiliated programmers—for example, artificially unfavorable license fees, channel positioning, penetration and packaging terms, and most favored nations provisions, although these differential terms significantly harm the ability of independent programmers to compete and warrant attention both within the context of this proceeding and more broadly. The transaction now under consideration also would provide Comcast even further leverage to enforce limitations on the ability of programing networks to

[46] *Comcast-TWC Application*, Declaration of Gregory L. Rosston & Michael D. Topper at 70.

distribute their network programming to viewers via alternative delivery platforms, either directly or by working with online services or technology partners.

Simply put, an entity controlling 30 percent of the television distribution market and nearly every top-25 television market exercises make-or-break power over the potential success of programming networks. Nothing in Comcast's record suggest that it will—at least without clear and enforceable merger conditions—refrain from using its cable distribution power to protect its programming assets and emerging distribution platforms.

B. Sports Programming Services Create Heightened Risk of Public Interest Harms.

The public interest harms threatened by the proposed transaction are especially acute in the context of sports programming. Both Comcast and TWC have significant interests in sports networks. TWC owns a significant number of regional sports networks, including SportsNets LA, which holds the rights to the L.A. Dodgers games.[47] And Comcast owns the NBC Sports Network, The Golf Channel, and a number of regional sports networks (often referred to as Comcast SportsNet), as well as the sports programming interests of the NBC Television Network.[48] It also has financial interests in the MLB Network, NHL Network, and NBA TV.[49]

In light of their sizeable interests in this area, each of Comcast and TWC compete aggressively for the content rights to sports programming.[50] As Comcast itself has recognized, "[t]he market for programming is very competitive, particularly for sports programming, where

[47] *See* C*omcast-TWC Application* at 16, 154 n.407.

[48] *See id.* at 13, 154.

[49] *Id.* at 12; *see also Comcast/NBCU Merger Order* ¶ 133.

[50] See Ted Johnson, *Regulators Ready to Take the Field For Dodgers Dispute*, VARIETY (Aug. 6, 2014), http://variety.com/2014/tv/news/regulators-may-mediate-cable-dispute-over-dodgers-1201276090/ (noting that TWC reportedly paid more than $8 billion over 25 years for the rights to the L.A. Dodgers).

the cost for such programming is significant."[51] Sports content, particularly live games, is proving to be increasingly important in the splintered and highly competitive consumer market and is, for many consumers, a principle reason for continuing to use traditional media.[52] Comcast and TWC thus have tremendous incentives to use their control over distribution to benefit their sports programming services and disadvantage competitors.

It is therefore of particular concern that Comcast has a clear track record of protecting sports networks in which it has an interest at the expense of rival networks that pose threats to their competitive success—a track record that raises the question of whether Comcast should be required to divest its sports networks if it wants to further increase its distribution network. As noted, in the *Tennis Channel* case, the Commission identified a clear pattern in which Comcast's sports network carriage "track[ed] the significance of [Comcast's] equity stake" in a sports network.[53] The record before it showed that no national programming networks in which Comcast had a financial interest were carried on its narrowly penetrated extra-pay "Sports Tier." That is the tier on which it relegates independent programming networks. By contrast, Comcast's wholly-owned sports networks, Golf Channel and NBC Sports Network, are carried to nearly 100 percent of digital subscribers. Further, three national sports networks in which Comcast owns a minority stake are carried on an intermediate service tier that reaches approximately 50 percent of its digital subscribers. In fact, Comcast moved one of them, the

[51] Comcast 2013 Annual Report on Form 10-K, at 15; *see also id.* at 35 ("Competition for popular content, particularly for sports programming, is intense . . . .").

[52] *See* Richard Morgan, *Live Sports Winning Kick for TV Ratings*, N.Y. POST (June 26, 2014, 11:14 PM), http://nypost.com/2014/06/26/live-sports-winning-kick-for-tv-ratings/.

[53] *Tennis Channel Order* ¶ 47. Comcast carries its majority-owned networks to 100 percent of subscribers, while it carries those networks in which it has a minority or indirect ownership on intermediate tiers, and carries only those networks in which it does not have any financial interest on its narrowly penetrated sports tier. *Id.*

NHL Network, from the narrowly penetrated Sports Tier to the intermediate tier shortly after acquiring equity in the network, and it likewise launched MLB Network on its 50 percent tier shortly after acquiring an equity interest in it.[54]

This pattern of favoring affiliated sports networks—with nearly perfect harmony with Comcast's ownership stake in a network— remains true today:

SPORTS NETWORKS ON COMCAST BY TIER

100% Subs	Comcast Affiliation
Golf Channel	YES
NBC Sports	YES
Comcast SportsNet	YES
ESPN	NO
ESPN2	NO

50% Subs	Comcast Affiliation
MLB Network	YES*
NBA TV	YES**
NHL Network	YES***
ESPN News	NO
ESPN U	NO
ESPN Classic	NO
NFL Network	NO^
TV Games	NO
CBS College Sports	NO

15% Subs	Comcast Affiliation
beIN Sport	NO
Big Ten Network	NO
Fox College Sports	NO
Fox Soccer Channel	NO
GolTV	NO
HRTV	NO
NFL Red Zone	NO^^
Speed	NO
Sportsman Channel	NO
Tennis Channel	NO

Affiliated with Comcast
* Comcast owns 8.3 percent of MLB Network.
** Comcast holds equity in NBA TV through its ownership in the National Basketball Association.
*** Comcast owns 15.6 percent of the NHL Network, and the League provides anchor programming for Versus.
^ Comcast carries NFL Network pursuant to a settlement of a program carriage dispute.
^^ Comcast also sells the HD version of the NFL Red Zone as part of its extra-charge HD package.

C. The Public Interest Will Be Harmed By Comcast's Ability To Foreclose Rival Programmers From Distributing Content Through New Distribution Platforms.

As online distribution and other alternative platforms become an increasingly important part of the video marketplace, Comcast's significant control over the nationwide broadband

[54] This not only harms rival sports programmers and fair competition, but has a direct impact on consumers, who are forced to pay a significant surcharge to access independent sports programming or else lose access to this programming.

market, as well as online distribution platforms and related technologies, create heightened risks for competition and diversity in these emerging markets.

In particular, new broadband-based distribution platforms provide programming networks with a significant and growing opportunity to reach audiences—a particularly important option if Comcast denies a programming network access to a broad audience on its traditional cable systems. To be clear, alternative distribution is still no substitute for traditional cable and satellite delivery for purposes of competing for advertisers and content licenses. However, it holds promise for rival programmers that compete with Comcast and are, on that basis, denied or given only limited carriage by providing an avenue to build relationships with audiences (including "tastemakers") and other industry stakeholders.

As the Commission recognized in connection with its approval of the Comcast/NBCU merger, Comcast has both the incentive and the ability to restrict independent programmers from distributing their programming through alternative distribution platforms. As the Commission found, Comcast has substantial "leverage to negotiate restrictive online rights from third parties, . . . to the detriment of competition"[55]— leverage that will increase dramatically if Comcast is permitted to acquire TWC. The Commission adopted a condition to address this public interest harm in the *Comcast/NBCU Merger Order*, but the Commission appears to have been primarily concerned about protecting online video distributors in light of Comcast's incentives to make it more difficult for such distributors to gain access to content and thereby insulate its own distribution platforms from competition.[56] Perhaps due to this focus on protecting rival

[55] *Comcast/NBCU Merger Order* ¶ 73.

[56] *Id.* ¶ 70 (recognizing Comcast/NBCU's "incentive[s] . . . to withhold or otherwise discriminate in providing online rights to video programming in order to prevent Comcast's [distribution] rivals from competing aggressively with it").

distributors, the temporary conditions imposed by the Commission include a number of exceptions. Indeed, Comcast recently has *defended* its rights and ability to impose online exclusivity provisions on independent programmers in statements to Congress, stating that, "[u]nder both the DOJ Consent Decree and FCC Conditions, Comcast (in this case, specifically, Comcast Cable) is permitted to obtain exclusive rights to show a program if the period of exclusivity is 14 days or less; and online exhibition for free of content for which Comcast pays a license fee can be prohibited for the 30-day period after the content has first aired."[57]

In addition to threatening competition for rival distribution platforms, Comcast's substantial leverage to impose restrictive provisions on online distribution directly threatens independent video programming services that compete with Comcast's programming services. To the extent that Comcast is allowed to impose such restrictions, Comcast has yet another avenue to restrict rival programmers from developing relationships with viewers and building their audience and brand. For example, as the Tennis Channel dispute illustrates, Comcast can lock a rival programmer into a cable carriage agreement that artificially limits its distribution to a narrow, extra cost tier—and thereby undermine the programmer's ability to compete for

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[57] *See Hearing on the Comcast-Time Warner Cable Merger Before the S. Comm. on the Judiciary*, 113th Cong. (Apr. 9, 2014) (response of David L. Cohen, Executive Vice President, Comcast Corp., to written question of Sen. Charles Grassley), *available at* http://www.judiciary.senate.gov/imo/media/doc/April%209,%202014%20-%20Cohen%20Responses.pdf (last visited Aug. 23, 2014). Comcast went on to defend such exclusivity provisions, noting that, "[e]xclusivity rights are a way for programmers and distributors to recoup the costs of original content, which generates more content, which is good for consumers . . . . and exclusivity is widely used by OVDs and MVPDs to distinguish their services." *Id.* This bland defense of exclusivity takes no account of Comcast's size, including its significant cable distribution network and growing TV Everywhere platform, its strong incentives to promote its distribution platforms, and its history of disadvantaging rival programmers. It is especially unpersuasive with respect to programming networks that Comcast carries on narrowly penetrated, extra cost tiers and thereby denies access to most of its subscribers, as this conduct results in patently less content for fewer consumers.

advertisers and content rights. At least in the absence of strong conditions, it can then prevent the programmer from reaching viewers through online platforms by forcing the programming network to agree to online exclusivity restrictions.

Moreover, it is anomalous for Comcast to be able to foreclose unaffiliated programmers from distributing content through alternative competing platforms when it is not free under the Communications Act to restrict them from distributing such content to traditional cable and satellite distributors. The program carriage rules prohibit Comcast and other MVPDs from "coerc[ing] any video programming vendor to provide, or retaliat[ing] against such a vendor for failing to provide, exclusive rights against any other *multichannel video programming distributor* [but not necessarily an online video distribution or other delivery platform] as a condition for carriage on a system."[58] Such online exclusivity restrictions directly contravene the intent, if not the letter, of the Communications Act. There is no sensible policy difference that justifies a flat prohibition on imposing exclusivity restrictions as against other MVPDs, but not emergent distribution platforms.

A combined Comcast/TWC's ability to limit rival programmers' distribution of content to viewers through alternative platforms is not limited, of course, to express exclusivity restrictions. Comcast can undermine competition and diversity for content through a number of additional limitations and provisions, all of which Comcast will be even better positioned to extract from independent programmers following its acquisition of TWC. For example:

- A common business model for independent networks seeking to distribute content through their own websites, mobile applications, and "smartTV" applications makes content available to authenticated pay-TV subscribers and therefore depends on the willingness of pay-TV providers, like Comcast, to authenticate their subscribers. To undermine a rival video programmer, Comcast can refuse to authenticate its subscribers

[58] 47 C.F.R. § 1301(b) (emphasis added).

to access a video programmer's content via its own websites and applications or those of third-party distributors. Alternatively, Comcast can condition its willingness to authenticate subscribers on unreasonable and/or anticompetitive terms and conditions designed to undermine the user experience and make the platform less attractive to consumers.

- To the extent a network seeks to distribute content designed specifically for an alternative platform (for example, innovative mobile content or interactive content), Comcast can impose provisions that prohibit the network from doing so altogether or insist on such content being made available to Comcast platforms.

- Comcast can extract aggressive "most favored nations" clauses that apply to all distribution platforms and are designed to undermine the development of new and innovative content and programming services.

- Comcast also will have significant (40 percent nationwide) broadband penetration and large financial stakes in video advertising technologies and services that will be enhanced by the proposed transaction, and these interests provide Comcast additional opportunities to foreclose competition. For example, the Commission previously has found that broadband providers have the incentive and ability to discriminate in the delivery of content via broadband-based distribution platforms.[59]

- The combined Comcast/TWC would have a significant stake in the dominant advertising technologies and services that enable programming networks to monetize alternative delivery platforms (whether through online streaming or video on demand distribution).[60] Comcast will therefore have the incentives and ability to restrict independent networks that compete with its programming services from accessing these technologies and services or to make them available on discriminatory terms and conditions. (It also could leverage its stake in these technologies and services to advantage its own distribution platforms over other platforms.)

Neither the existing program carriage framework, nor the *Comcast/NBCU Merger Order*, adequately address the foregoing concerns—which have become far more concrete only in recent years. Accordingly, while evolving alternative distribution platforms and business models have

[59] *See Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 ¶ 22 (2010), *aff'd in part, vacated and remanded in part subnom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[60] For example, Comcast was one of the founders of advertising technology company Canoe Ventures, LLC, and Comcast acquired online advertising company FreeWheel earlier this year. *See About Us*, CANOE, http://www.canoe-ventures.com/about.html (last visited Aug. 23, 2014); Jeff Baumgartner, *Comcast Wraps FreeWheel Deal*, MULTICHANNEL NEWS (Mar. 6, 2014, 10:48 AM), http://multichannel.com/news/content/comcast-wraps-freewheel-deal/355998.

tremendous promise for competition and diversity in video programming, the proposed transaction raises serious questions about whether that promise will be realized, at least in the absence of stringent conditions that ensure Comcast is not permitted to undermine the growth of a competitive distribution and programming marketplace.

III. The Transaction Should Not Be Granted Without Comprehensive And Unambiguous Conditions.

If the Commission determines that the public interest would be served by permitting Comcast to acquire TWC, the transaction should be subject to stringent conditions that strengthen and expand on those adopted in connection with the Commission's approval of the Comcast/NBCU combination.

A. The Comcast/NBCU Conditions Are Not Sufficient To Address Comcast's Greatly Expanded Ability To Foreclose Rival Programmers.

The program carriage conditions imposed by the condition three and a half years ago should, at a minimum, be extended for a significant period (at least 10 years from consummation) as a condition to the transaction, but they also must be supplemented, as they are not a sufficient check on Comcast's incentive and ability to discriminate against rival programmers.

For example, a non-discrimination condition that is based on the prohibitions under Section 616 and its implementing regulations are of questionable efficacy until the Commission resolves important questions about burden of proof and persuasion and the applicable evidentiary tests and makes important process improvements to ensure that independent programmers have meaningful opportunity to obtain relief through Section 616 proceedings.

The non-discrimination condition to which Comcast is subject for a remaining three and a half years (unless extended) largely mirrors the non-discrimination requirement under Section 616 and its implementing regulations, except that a programmer alleging a violation of the merger conditions need not demonstrate it is "unreasonably restrained from competing, as it would under [the Commission's] program carriage rules."[61] Since the time that condition was adopted, the D.C. Circuit has injected uncertainty with respect to the standards and evidentiary tests applicable to establishing discrimination "on the basis of affiliation or nonaffiliation . . . in the selection, terms, or conditions for carriage"—whether under Section 616 or a condition using this same language and that is therefore susceptible to the same judicial gloss and interpretation. While the D.C. Circuit's recent vacatur of the Commission's decision in the *Tennis Channel* case did not disturb key factual findings (which must necessarily inform the Commission's judgment in this proceeding), the court's decision did raise important substantive issues about the standards and evidentiary tests. Unless the Commission resolves Tennis Channel's pending Petition for Further Proceedings and does so in a way that ensures that Section 616 can be operate as a meaningful and enforceable remedy for discrimination, then the Commission cannot rely on Section 616 (or a condition that is based on and interpreted based on Section 616) to provide meaningful relief to independent programmers.

At a minimum, the Commission must extend the non-discrimination requirement for an appropriate period of time (Tennis Channel proposes ten years) and clarify the applicable evidentiary tests with respect to program carriage discrimination complaints under the Comcast merger orders. However, Tennis Channel believes that the Commission also can and should use

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[61] *Id.* ¶ 121. Specifically, the condition provides that, "Comcast shall not discriminate in Video Programming distribution on the basis of affiliation or non-affiliation of a Video Programming Vendor in the selection, price, terms or conditions of carriage (including but not limited to on the basis of channel or search result placement)." *Id.* at App. A. Similarly, the FCC's program carriage rules allow for the filing of complaints with the Commission against an MVPD that has unreasonably restrained the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage. *See* 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C. § 536(a)(3).

the instant merger proceeding to resolve the outstanding questions regarding the applicable evidentiary tests under Section 616 pending under the Petition for Further Proceedings with respect to the dispute between Tennis Channel and Comcast.[62]

Likewise, just months after the Commission approved the combination of Comcast/NBCU, the Commission itself found that "the unpredictable and sometimes lengthy time frames for Commission action on program carriage complaints have discouraged programming vendors from filing complaints"[63] and that "programming vendors may feel compelled to agree to the carriage demands of MVPDs, even if these demands violate the program carriage rules, in order to maintain carriage of video programming in which they have made substantial investments."[64] The Commission therefore amended its program carriage rules to establish timelines for the Commission's resolution of complaints and adopt an explicit mechanism through which a programmer may petition for a temporary "standstill" of its programming contract (*i.e.*, temporary carriage) pending resolution of a complaint, and it invited comment on other important measures, including the applicable burdens of proof and persuasion.

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[62] For example, the Commission could make clear that a video programming vendor complainant need not show either (i) that Comcast's distribution business could have obtained a "net benefit" from carriage of the Video Programming on the terms and conditions sought by the Video Programming Vendor; or (ii) that the incremental losses from carriage of the Video Programming on the terms and conditions sought by the complainant Video Programming Vendor would have been the same or less than the incremental losses from carrying a C-NBCU Programmer's Video Programming on such terms and conditions. Likewise, the Commission should, consistent with the condition it imposed in the *Comcast/NBCU Merger Order*, make clear that that a complainant is not required to show it is unreasonably restrained from competition by reason of the discrimination that it alleges.

[63] *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Rcd 11494 ¶ 19 (2011). Tennis Channel itself has experienced this, as a program carriage complaint it filed in 2010 against Comcast is still pending before the Commission.

[64] *Id.* ¶ 26.

The standstill relief procedures have since been vacated by the Second Circuit on procedural grounds,[65] and the Commission has not yet decided whether to reinstate a standstill remedy or acted on the additional proposals related to the effective enforcement of program carriage complaints on which the Commission sought comment in its 2011 *Program Carriage Order and NPRM*. These outstanding issues include the critical question of the appropriate burdens of proof and persuasion under Section 616. These issues also must be resolved in a manner that ensures that Section 616 and similar merger conditions can operate as a meaningful and enforceable remedy for discrimination.

B. Additional Conditions Are Necessary To Protect Against Comcast's Increased Ability to Discriminate Against Unaffiliated Programmers.

To the extent that the Commission relies on its program carriage rules and a non-discrimination condition to prevent public interest harms, the Commission should extend the condition for at least ten years and ensure the condition provides meaningful relief for independent programmers—relief that is not unduly expensive or burdensome to seek—including by resolving critical questions that remain unresolved in the Commission's program carriage rulemaking proceedings. Specifically, we urge that the Commission amplify its non-discrimination requirement as follows:

- In every complaint under Section 616 or a program carriage merger condition, once the complainant makes out a *prima facie* case that it is being treated differently from a similarly situated network affiliated with Comcast, Comcast/TWC should be required to carry the burden of proof and production to demonstrate that it acted for a non-discriminatory reason. In addition, as described above, the applicable evidentiary tests should be clarified following the recent decision of a panel of the D.C. Circuit.[66]

- The program carriage process takes far too long to provide a meaningful remedy for independent cable networks. The process for pursuing complaints under this condition

[65] *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 171 (2013).

[66] *See supra* note 58.

should be an accelerated process. At a minimum, the Commission should propose that the arbitration conditions available to enforce other aspects of the Comcast/NBCU merger conditions also are available to enforce discrimination complaints against Comcast as an alternative to Commission adjudicative procedures.

- For the same reason, the Commission should expressly adopt the availability of standstill relief in connection with a claim of discrimination against Comcast. The Commission is free to adopt such relief — which it determined was appropriate and in the public interest — in connection with the enforcement of claims of discrimination against Comcast.

- The Commission should impose a prohibition on retaliation that prohibits retaliation for a programmer's exercise of rights under Section 616 or the merger conditions or any other form of complaint relating to discriminatory carriage.

- The Commission should take steps to ensure that the prohibition on Comcast engaging in discriminatory conduct prohibits Comcast from limiting an unaffiliated programmer's carriage on Comcast-controlled online platforms, refusing to enter into TV Everywhere arrangements (whereby Comcast distributes a programmer's content on an authenticated basis via its TV Everywhere service and/or authenticates subscribers to allow subscribers to view a programmer's content on the programmer's TV Everywhere service), or refusing to make available other technologies and services on non-discriminatory terms.

- Comcast should be prohibited from requiring independent programmers to provide it with any exclusivity rights, not just against other MVPDs, but against all other distributors (including online, mobile application, and other technologies).

In light of Comcast's unprecedented size and its checkered track record, it is fully appropriate for the Commission to impose conditions on Comcast that it has not yet decided to impose on others through a broadly applicable rulemaking.

Second, following the closing, programmers will cease to have the opportunity to negotiate for carriage on the legacy TWC systems without influence from Comcast's programming interests unless appropriate conditions are imposed. At the time of the closing, the combined entity would presumably seek to distribute programming vendors' content under the more favorable of either the Comcast or the TWC affiliation agreement (and, possibly, with respect to certain systems, a Charter affiliation agreement). In some cases, this outcome will result from contractual rights; in other cases, it will be due to the leverage of the combined entity, derived in large part from its ability to foreclose programming vendors from nearly every key television market and 30 million subscribers' homes. To help mitigate against the anticompetitive effects that would arise if the Comcast affiliation agreements were to govern the acquired systems, the Commission should impose a condition on Comcast that permits programming vendors to opt for one affiliation agreement or the other through expiration of such agreement and, upon expiration of a governing TWC affiliation agreement, the right to choose to negotiate with the combined entity for separate carriage terms with respect to the legacy TWC systems.

Third, the stakes with respect to foreclosure from the combined entity's cable systems (plus foreclosure from Comcast-controlled online distribution platforms) are too high to rely solely on a framework in which programmers have to litigate to enforce the anti-discrimination conditions. Discriminatory conduct is inevitable if Comcast's distribution executives regularly work together with its programming executives on carriage decisions with respect to Comcast's "sibling" networks, as was illustrated by the *Tennis Channel* case.[67] Accordingly, the Commission should adopt a condition requiring appropriate structural separation between Comcast's cable distribution and programming business operations. This condition should be designed to prevent Comcast's distribution business from making carriage decisions that favor Comcast's affiliated programming entities and should require that Comcast's distribution business negotiate with video programming vendors and make carriage decisions without influence from Comcast/NBCU's programming business. And Comcast should periodically be required to demonstrate to the Commission its compliance with these requirements.

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[67] *See* notes 18–21 *supra* and accompany text.

C. Comcast's Ability To Limit Competitive Programming Services From Competing Through Alternative Distribution Platforms Should Also Be Subject To Stringent Conditions.

Comcast must be prohibited from, either directly or indirectly, inhibiting or undermining the distribution of content to consumers through any platform. In connection with its review of the Comcast/NBCU merger, the Commission adopted a condition to limit Comcast's ability to enter into agreements or enforce agreements that forbid, limit, or create economic incentives to limit the distribution of video programming through online video distributors.[68] However, as described above, the Commission's condition was subject to a number of exceptions, including an exception that expressly permits Comcast to restrict programming networks from delivering linear feeds of their programming via alternative delivery platforms for free to consumers for up to 30 days after Comcast first distributes the programming to consumers.[69] Give the potential for growth that these alternative platforms offer, the Commission should eliminate such exceptions since they permit Comcast to foreclose competition.

In addition, these conditions are scheduled to expire in January 2018, and thus they provide little time or incentive for competing programs to invest in the development and promotion of new services and alternative delivery platforms—which could take several years to produce a return. The Commission should extend and strengthen the condition it adopted to limit Comcast's ability to enter into or enforce carriage agreements that restrict a video programmer from providing programming to online video distributors by flatly prohibiting such provisions. By extending a stronger set of restrictions that endure for a sufficiently long period of time, the Commission would facilitate innovation and investment in alternative delivery mechanisms and

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[68] *Comcast/NBCU Merger Order* at App. A, Sec. IV.B.

[69] *Id.*

new programming services. The Commission should also explore other conditions designed to prevent Comcast from indirectly inhibiting or undermining the distribution of content through alternative platforms, including those threats discussed in Section II.C.

* * *

The proposed transaction would provide the combined Comcast/TWC with unparalleled opportunities to discriminate against rival programmers and risks significant public interest harms. Any grant of approval for the transaction should be conditioned on strong safeguards.

Respectfully submitted,

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